No. 21567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N. FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON, JR., WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEE SANDS' BRIEF.

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Discussion.

Appellee Sands files this Brief in response to Appellant's Opening Brief and in support of the District Court's Judgment dismissing the cause for failure to state a claim upon which relief can be granted against all defendants including this Appellee.

The Complaint herein charges the defendants with a conspiracy to deprive Appellant of his civil rights in connection with certain divorce proceedings. All of the defendants except Albert D. Matthews and Wilfred H. Tomlin were and are attorneys at law and at various times represented Appellant's wife in the divorce action. Appellee Sands is alleged to have been substituted as one of the attorneys for Rosamond B. Haldane in May

of 1961, and thereafter is alleged to have participated in the conspiracy by obtaining an order for attorney's fees in the divorce proceeding and causing the entry of the final judgment of divorce. Appellee Sands was not a defendant in the case of *Haldane v. Chagnon, et al.,* 345 F. 2d 601 in which this Court affirmed a Judgment of Dismissal by the District Court of a Complaint arising out of the same divorce action as is mentioned in the present action.

As will be shown hereinafter under the heading "ARGUMENT", the Judgment of Dismissal heretofore made and entered by the District Court is entirely correct and proper. The judgment should be affirmed on the following grounds:

1. No claim can be stated under the Civil Rights Act for activities of an attorney engaged in purely private litigation and not acting under color of state law or authority.

2. The claim of Appellant is barred by the applicable statute of limitations.

3. The claim of Appellant as against Appellee Sands is barred by the doctrine of *res judicata* or collateral estoppel.

ARGUMENT.

I.

The Complaint Fails to State a Claim Under the Civil Rights Act Against Appellee Sands as an Attorney Engaged in Private Litigation and Not Acting Under Color of State Law or Authority.

It is clear from the Complaint itself [R. 2] that Appellee Sands was at all times acting as an attorney at law engaged in private litigation and not acting under color of state law or authority. It is alleged:

> "That at all times herein mentioned defendants . . . Sands . . . were and are licensed attorneys at law, members of the bar of the United States District Court for the Southern District of California and of all the courts of California." [R. 2].

The Complaint then recites certain "overt acts" allegedly committed by Appellee Sands commencing with the substitution of Appellees Sands and Thompson as attorneys for Rosamond B. Haldane in the place of Appellees Chagnon and Freedman [par. 18, R. 6]. The other "overt acts" charged against Appellee Sands can be summarized as including an application for attorney's fees, recording a judgment for attorney's fees and causing the final judgment of divorce to be entered [pars. 20, 21 and 23 R. 6-7].

The so-called "overt acts" of Appellee Sands are characterized as constituting personal wrongs against Appellant. However, from the mere reading of the complaint they are nothing more than the ordinary procedures followed in any divorce action. The alleged "overt acts" are clearly the activities of an attorney engaged in private litigation and certainly not acting

as a state officer or under color of state law or authority. Such activities, even though allegedly wrongful, do not support an action under the Civil Rights Acts.

As was stated in *Spriggs v. Pioneer Carissa Gold Mines,* 251 F. 2d 61 (10th Cir. 1957) when the court sustained a ruling that no claim could be stated under the Civil Rights Act:

> "The substance of the prolix and redundant Complaint is that the protracted State Court litigation had the designed conspiratorial effect of depriving appellant of his adjudicated property rights without due process or the equal protection of the laws. The litigation complained of is found in the reported decisions. [Citations]. It is sufficient for purposes of this appeal to state that every act complained of was done and performed in the prosecution and decision of matters in a court of competent jurisdiction. The Court in each instance had jurisdiction of the subject matter and of the parties, and was authorized and empowered to decide the issues presented. It follows that no claim can be stated under the Civil Rights Act. [Citations]" (Pp. 61-62).

In the case of *Swift v. Fourth National Bank of Columbus, Georgia,* 205 F. Supp. 563 [USDC MD Ga. 1962] the Court stated at page 556:

> "It is apparent from the complaint that the plaintiffs, or some of them, have been parties to state court litigation with results considered by them to be unsatisfactory, but it cannot be seriously contended that the lawyers who participated in the trial of these matters, nor the judges who presided over the proceedings in the State Court are state functionaries acting under color of state

law within the meaning of the Civil Rights Act. This was private litigation and the state merely furnished the forum and had no interest one way or another in the outcome."

The basic principle with respect to the liability of attorneys under the Federal Civil Rights Acts is succinctly stated in the case of *Skolnick v. Martin,* 317 F. 2d 855 at 857

> "Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts."

See, also, in accord:

Haldane v. Chagnon, 345 F. 2d 601 (9 Cir. 1965);

Meier v. State Farm etc. Co., 356 F. 2d 504 (7 Cir. 1966).

II.

The Complaint Is Barred by the Applicable Three-Year Statute of Limitations, California Code of Civil Procedure Section 338(1).

Since there is no Federal statute fixing a period of limitation on civil rights actions, the applicable statute of the forum controls.

Crawford v. Zeitler, 326 F. 2d 119, 121 (6 Cir. 1964).

The applicable California statute provides for a three-year period of limitation under *California Code of Civil Procedure* Section 338(1).

Lambert v. Conrad, 308 F. 2d 571 (9 Cir. 1962);

Smith v. Cremins, 308 F. 2d 187, 190 (9 Cir. 1962).

In this case it is alleged that the defendant Sands was substituted into the divorce action in May, 1961. Other so-called "overt acts" are alleged in 1962 with the final one for defendant Sands alleged as taking place on January 29, 1963, when defendant Sands and Thompson "procured" the entering of a Final Judgment of Divorce. The Complaint was filed January 24, 1966, and thus if each "overt act" is taken separately any claim would be barred except with respect to the last one. However, the period of limitations would run from the last "overt act" from which damage could have flowed (*Lambert v. Conrad,* 308 F. 2d 571). The Entry of the Final Judgment is simply a ministerial act making the divorce complete so far as the status of the parties is concerned. Paragraphs 20, 21 and 22 alleging "overt acts" during 1962 when this defendant is alleged to have obtained orders for "thousands of dollars as attorney's fees" would appear to be the last overt acts from which plaintiff could have suffered damage. Thus the entire action would be barred by the three-year statute.

III.

The Present Action Brought by Appellant Haldane Is Barred by the Doctrine of Res Judicata or Collateral Estoppel.

In the prior action, the dismissal of which was affirmed in *Haldane v. Chagnon,* 345 F. 2d 601 (9 Cir. 1965), two of the present Appellees, Chagnon and Freedman, were sued on a Complaint almost identical to the one here in question for alleged conspiracy to violate Appellant Haldane's civil rights. The basis of that action was found in the same divorce action as is the basis of the present action. The prior action was

brought under the Federal Civil Rights Act as is this one. As pointed out in the Brief of Appellees, Chagnon and Freedman (Brief, pp. 19-20), said Appellees were sued in their capacity as attorneys at law and in connection with private civil litigation, that is, the Haldane divorce action. In dismissing the prior action the District Court in its Judgment stated:

> ". . . it is clear from the allegations that defendants Wilhelmina Helen King Chagnon and Horace N. Freedman were not acting under color of authority of any law." [R. 44, line 31, to R. 45, line 1].

In the present action Appellee Sands was named a defendant as another attorney involved in the Haldane divorce litigation. His position is identical with that of the attorneys involved in the prior action. Appellant Haldane was the plaintiff in the earlier proceedings, that the issues with respect to the position of the attorney defendants were fully litigated is amply shown by the appeal in *Haldane v. Chagnon,* 345 F. 2d 601. The issues as to the attorneys' liability under the Civil Rights Act were decided adversely to Appellant Haldane and, whether the doctrine be denominated *res judicata* or collateral estoppel, he is now barred from re-litigating these issues.

The leading case on the point is *Bernhard v. Bank of America* (1942), 19 Cal. 2d 807. There the Court stated at page 810:

> "The doctrine of res judicata precludes parties or their privies from re-litigating a cause of action that has been finally determined by a court of Compjetent jurisdiction. *Any issue necessarily decided in such litigation is conclusively determined*

as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." (Emphasis added).

Again at page 813 the Court states:

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication." (Emphasis added).

See in accord:

Teitelbaum Furs Inc. v. Dominion Insurance Co. (1962), 58 Cal. 2d 601, 604;

Zdanok v. Glidden Co., 327 F. 2d 944, 954-6 (2 Cir. 1964);

United States v. United Airlines, 216 F. Supp. 709, 724-729 (USDC Nev. 1962).

Conclusion.

On the basis of the foregoing principles, Appellee Sands respectfully urges that the Judgment of Dismissal heretofore made and entered by the District Court be affirmed.

Respectfully submitted,

Moss, Lyon & Dunn,
By Charles B. Smith,
Attorneys for Appellee Sands.

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

CHARLES B. SMITH